Geoffrey Sawer Lecture
Australian National University

(As prepared for delivery – September 3, 2010)

Thank you Professor Coper for that kind introduction. I want to thank both Professors Coper and Rubenstein along with ANU for their hospitality and for inviting me to deliver the thirteenth annual Geoffrey Sawer lecture. It's a great privilege. I was looking at the list of past lecturers, including my good friend Dean Kathleen Sullivan, and it is quite an esteemed group. I will do my best not to bring down the curve tonight.

My topic tonight concerns an area that has generated a great deal of heat in the United States, but not a lot of light. Specifically, it is the use of foreign or international law in American courts.

From reading the popular media over the last several years, you might think that United States courts reject the use of international law and that it is generally controversial even to cite to foreign law. This is wrong, but it is based on some high profile events over the last few years which made people' wonder. So I'd like to set the record straight.

There is no doubt that there were some events over the last few years that raised concerns about U.S. commitment to international law, and its broader engagement in the international legal community.

Some involved the United States expressing reluctance about certain international agreements. To be specific: the U.S. signed but declined to ratify the Kyoto Protocol; it signed and then unsigned the Rome Treaty establishing an international criminal court; and – after the U.S. lost a case against Mexico in the International Court of Justice that arose under the Vienna Convention case – the U.S. withdrew effectively withdrew from the ICJ's jurisdiction – specifically, it withdrew from the optional protocol by which Vienna Convention disputes would continue to go to the ICJ. So these high-profile actions raised concerns about the U.S.'s willingness to be bound by decisional law of international courts or tribunals.

Certain other actions in the war on terror also raised concerns about the U.S. commitment to international law. The principal ones were of course the use of the Guantanamo base in Cuba to hold terror suspects indefinitely; and the revelation that the U.S. Justice Department had approved the use of certain enhanced interrogation techniques that most humanitarian law experts believed violated international norms.

Finally, there's been this lively debate within the U.S. Supreme Court and among some lower courts and academics, about when and how international law norms should be considered in interpreting federal laws. Justice Scalia was recently here in Australia and he gave a very spirited critique of Supreme Court decisions that had looked to decisions of foreign courts to help determine whether, for example, executing people with severe mental disabilities or minor children for crimes they've committed would be considered cruel and unusual. His view is that giving any credit to foreign law is to break faith with a Court's commitment to apply only the laws of their nation that were achieved through their internal democratic process, and to cloud decision-making with ideas that are drawn from different traditions, in a different context, for different purposes, by a different system.

This whole constellation of events and high-profile criticisms inspired some observers to question whether the U.S. was abandoning its commitment to international law. It also inspired certain members of Congress to fuel the media fire by proposing legislation that would specifically ban virtually any reference to international law or foreign judicial decisions in American courts.

So let me be perfectly clear from the outset about the actual state of American law. I've said this before – both as a lawyer in the White House and now as an Ambassador – but I want to repeat it again. The United States is committed to its international responsibilities, and it is committed to the Rule of Law. This Administration has reminded everyone through every channel of the Cabinet that U.S. agencies honor international obligations, and the President himself has traveled the globe to assure the world of that commitment.

The U.S. has also taken specific actions that reflect this commitment. The United States has repudiated the so-called "torture memo" and barred the so-called "enhanced interrogation techniques." It has begun the process of closing Guantanamo, and 600 of the 775 detainees have already been transferred out of Guantanamo.

But it is not merely decisions by the Executive that can change from Administration to Administration. For example, the Supreme Court itself also established the right of detainees in Guantanamo to certain basic protections. Moreover, it recently ruled, in part based upon review of domestic and foreign decisions, that imposing life without possibility of parole upon someone for a crime committed before they are 18 was "cruel and unusual."

Finally, with respect to international agreements, the U.S. is currently reviewing whether to re-sign the previously signed and then un-signed Treaty of Rome. The U.S. has also aggressively pursued renewed international engagement in new areas, including the

recent climate change accord in Copenhagen, and the Trans-Pacific Partnership that would bind South America, Asia, Australia, and the U.S.

While these recent steps have addressed criticism that the United States no longer respects international norms, I also want to be clear that concern about the United States courts ever seriously backing away from their responsibilities to enforce international law or consider foreign law were always overstated. The truth is that U.S. Courts apply, and have always applied, international law in numerous ways every single day without controversy regardless of which Administration is in power.

The first and most obvious way in which U.S. courts apply international law is by enforcing international agreements, whether those are international treaties or merely commercial agreements or contracts. U.S. courts apply and interpret these international laws daily and they've developed expertise in doing this. The fact that the U.S. government will sometimes amend or rescind an agreement may reflect a shift in substantive policy, but it is not a rejection of international law. Indeed, it is no different than Congress amending any other law.

The second way in which international law is regularly applied in U.S. Courts is where a U.S. law expressly incorporates international law into its application. For example the Alien Tort Claims Act lets individuals bring actions against persons who violate the law of nations under color of state authority. To determine what the law of nations means requires an examination of international and foreign law. And again, American Courts handle this sort of inquiry all the time, and have developed expertise at understanding these other systems and decisions as a result.

Which brings us to the third and final way in which U.S. Courts may and do consider international laws or decisions of foreign courts: Courts commonly cite international and foreign law in U.S. court decisions to help them in interpreting domestic law – whether it is statutory or constitutional. As I'm sure you know, this practice can generate more than a little controversy among academics and some judges. But my point is not to wade deeply into that thicket. My point is simply that it happens all of the time, and despite the back-and-forth in the Supreme Court on the subject, I expect it will continue to be a common practice for three reasons.

First, this practice has long historical roots and it began for a very practical reason. When the United States first started, we had no body of federal law to draw upon. So it was both expected and frankly necessary that U.S. courts would have to look to international laws and analogous court decisions to help figure out how to resolve legal disputes.

So, not surprisingly, the U.S. Supreme Court since its inception has been making reference to foreign law. Under the legendary Chief Justice John Marshall, the Court

routinely looked to other nations to interpret treaties or settle disputes concerning ships on the high seas. The Charming Betsy decision in 1804 is just one example. References to foreign decisions and laws in constitutional cases can be found throughout the Court's history. In the Dred Scott case – the famous slavery case from the mid-1800s that helped trigger the civil war – both the majority and the dissenting opinions referenced foreign law. And since we're all here in Australia (and I used to teach the Commerce Clause), I have to mention Wickard v. Filburn – one of the more famous Supreme Court decisions on the Commerce Clause. There, in 1942, the Court discussed the Australian experience in regulating wheat markets in holding that the U.S. Congress could regulate wheat production for home consumption.

I could cite countless examples but I think you get the point. The Courts have always looked to the laws of other countries, and the practice has not been particularly controversial except in cases involving certain highly sensitive issues such as capital punishment.

But the practice I believe will continue not merely because it is embedded in precedent. The second reason it will continue has to do with the nature of judging. When the law is not clear, judges still have to make a decision and so they tend to look at anything that may give them some insight. American lawyers, recalling their course in evidence, may analogize this to how lawyers are allowed to use basically anything to refresh a witness's recollection. If a witness thinks that waving a bowl of fettuccini alfredo under their nose will refresh their recollection, then you can bring fettuccini into the courtroom. The fettuccini isn't evidence, it is a trigger that moves the thought process forward.

The same is true of many things in judging. Oliver Wendell Holmes observed that the common law is not a brooding omnipresence in the sky to be divined by judges, but at the same time he routinely drew from opinions of other Courts including state courts to refine his thinking. I recall when I was clerking that judges cited all sorts of non-binding and non-judicial materials in their opinions that helped them reach a decision. Chief Justice Rehnquist cited the Star Spangled Banner and various folk poems about the flag in his opinion regarding flag burning ("shoot if you must this old grey head, but spare the Country's flag she said"). Chief Justice Burger often cited the bible. Justice Scalia has cited Sherlock Holmes. Nearly all of the Justices have cited law review articles, and empirical studies, and opinions from state courts, not as precedent but as a way of helping to understand the history of a law, its practical effect, and the meaning of its language.

So if our judges are trained in this tradition, it would be reasonable to expect that they would draw upon insights from a similar legal system that's examining the same issue, while they are quoting poets, and scholars, and religious texts. I expect that judges are going to look to any sources that will help them decide.

Finally, the third reason that courts will continue to consider international experience when they are deciding domestic law has to do with our nation's fundamental belief in inalienable rights. The United States was founded on the idea that certain rights exist independent of government. "We hold these truths to be self-evident. The all men are created equal. That they are endowed by their creator with certain inalienable rights."

These rights transcend borders and reflect common principles that apply to all people. This principle in not merely hortatory language – it is reflected in where we invest our money and how we act internationally. The U.S. invests billions annually to spread this message about the rule of law and human rights around the world. We do this because we believe at our core that people do share some common sense of justice. Today, we have diplomats all around the world demanding that other Countries follow basic norms – whether it has to do with protecting our common environment, ensuring the right to practice your religion, preventing systematic abuse of labor, or protecting the right to dissent and free speech.

So it would be fundamentally inconsistent for us after enlisting all of the apparatus of the U.S. to advance this common set of values, to then turn around and ignore in the law those instances where common values can be discovered.

This conclusion, that we should not be afraid to consider developments in other systems and international norms formed across systems thus is embedded into the U.S. system.

Now in saying this, I do not mean to diminish fair criticism of how Courts have used foreign or international law, or the fact that this method of understanding U.S. law is not subject to abuse. The mere fact that courts will use international norms doesn't end the matter. Opponents often criticize the use of international law and foreign decisions in U.S. courts as selective, anti-democratic, and misleading. These concerns have some merit, and so we have a duty to make sure that foreign decisions are assessed carefully: it requires a fair understanding of their context, and a firm appreciation for the difference between what is precedent and what is not.

The point is that we should not limit the ability of judges to cite foreign decisions; but we should improve their ability to evaluate those decisions. This means that rather than insulate our courts from international law, we need to train lawyers and jurists to better understand the relevance and weight of foreign laws and decisions.

Unless a judge is very knowledgeable about another legal system, it is hard for him or her to know whether the facts of a foreign case are analogous, the law is analogous, or the systems are analogous enough to draw meaningful conclusions from that decision. How do we know if U.S. judges are competent to interpret foreign law, and vice versa? Well, the same way we make sure that judges know the background of any other decision. We

depend upon a combination of lawyers who know their stuff, as well as the experience judges have filling in the gaps in their knowledge. As I said, judges already interpret international law and foreign decisions in many other contexts, so this is nothing new.

Our challenge is to do it better. That requires allowing more lawyers and judges with experience in international law to participate in U.S. courts. As the great Oliver Wendell Holmes said "the life of the law is not logic; it has been experience." Any good lawyer or judge will admit that their confidence in a decision depends upon who wrote it, the reputation of the court and the lawyers, and many other things that you pick up in practice. The best way for lawyers in different countries to develop judgment about the value of a decision is through experience. That experience includes conferences and programs like our International Legal Exchange and the Fulbright program. I was proud to see that both Professors Coper and Rubenstein are alumni of the program, both having been Fulbright Senior Scholars in the U.S. But that experience also is also gained through practicing law in different countries with different systems.

To achieve this we would need some easing of unnecessary restrictions on the ability of non-U.S. lawyers to experience U.S. courts. As a former State Bar President, this is probably a heretical thing to suggest, you know, that any bar would ever knowingly create artificial barriers to entry or anything . . . .

Since the time of the Australia-U.S. Free Trade Agreement, we have been working on easing restrictions on practice between our two countries. In California, this might include allowing Australian law graduates and lawyers to sit for the California bar even though they have not graduated from a California accredited legal institution. Allowing Australian lawyers to appear in California courts pro hac vice. And to improve access for them to work as foreign legal consultants to advise U.S. clients in foreign and international law in cooperation with local U.S. lawyers. While the goal of the Free Trade Agreement is simply to allow more qualified foreign lawyers to gain practical, nuts and bolts legal experience in the U.S., my point is that it also serves another important goal. It would give other nations valuable exposure to the U.S. legal system in general, and it would give us a better sense of the lawyers, judges, processes, and other influences on foreign decisions.

This is important, not just because it is a way to increase commerce between our nations, but because it is a way to increase understanding that improves both of our legal systems. Foreign and international law, and the work of international lawyers and courts, have been part of our system from the beginning and have improved our system.

So let me finish with this thought from Justice Sandra Day O'Connor, who was one of my mentors – as well as my tennis partner – when I clerked at the Court many years ago. She said, in typical plain spoken fashion: "no institution of government can afford to

ignore the rest of the world." As I hope I've made clear, United States courts are no exception.